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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN APULLI AVERILLA, Defendant and Appellant.	H033112 (Santa Clara County Super. Ct. No. 104095)

On July 1, 1986, a jury found appellant Juan Averilla guilty of three counts of committing a lewd and lascivious act upon a child under the age of 14 years by use of force, violence, duress, menace, or threat of great bodily harm (Pen. Code, § 288, subd. (b), [1] counts one, two, and three), one count of sexual penetration by a foreign object (§ 289, subd. (a), count four), and one count of forcible rape (§ 261, subd. (a)(2), count five).

Before the scheduled sentencing date of August 12, 1986, appellant absconded and the court issued a warrant for his arrest. Thereafter, over 21 years later, appellant was arrested on December 11, 2007.

On June 20, 2008, the court sentenced appellant to 18 years in state prison consisting of the mid-term of six years on count four, the mid-term of six years on counts

[1] All unspecified section references are to the Penal Code.

one and five to run consecutively pursuant to section 667.6, subdivision (d). On counts two and three, the court imposed the mid-term of six years as to each count but ran the terms concurrent to the other terms.

On June 25, 2008, appellant filed a notice of appeal.

On appeal, appellant frames the issues before this court as follows: "[I]n a trial where there were no corroborating witnesses, no forensic evidence and no prior acts of misconduct by the defendant, was it error for the trial court to exclude evidence that the 15 year-old complaining witness in a sexual molest case had made similar, false allegations against both her older brother and her 19 year-old boyfriend? . . . [¶] In addition, where a critical impeachment witness, who was not legally available during the trial, becomes available after trial, is it error to deny a motion for a new trial per Penal Code section 1181, subdivision (8)?"

For reasons that follow, we determine that any error that occurred in this case was harmless and that the trial court did not err in denying a new trial motion 21 years after the original verdicts were rendered. Accordingly, we affirm the judgment.

Facts and Proceedings Below[2]

Prosecution Evidence

Sheila, who was 15 years old at the time of trial, moved to the United States from the Philippines in 1980.[3] She had three brothers and a sister, all of whom were older than Sheila. When she was in the Philippines, Sheila lived with her mother, and her two brothers, Jeff and Joel. Sheila's oldest brother John and her sister lived elsewhere with appellant. After Sheila and her family moved to the United States, appellant moved into

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[2] It appears that there are no longer any reporters' transcripts from the trial. Accordingly, the facts are taken from the "SETTLED STATEMENT FOR JURY TRIAL HELD JUNE 25-JUNE 30, 1985" filed with this court on March 3, 2009.

[3] For the sake of clarity we will refer to witnesses by their first name. No disrespect is intended.

their San Jose home to live with them. At that time, Sheila was 11 years old. Previously, she had never lived with appellant.

Within approximately nine months of appellant moving into the home, he began to make " 'passes' " at Sheila. When Sheila was 12, appellant touched her breasts and vagina. This happened again when she was 13 and, after that first time, five to 10 additional times. Sheila thought that appellant might have inserted his finger into her vagina twice, but she was unsure. The last time "it" happened was in July 1984. Appellant kissed her more than five times by putting his tongue into her mouth. The kissing occurred before and after Sheila was 14 years old.

Sheila and her family moved to Milpitas from San Jose when Sheila was 14. While living in Milpitas, appellant had sexual intercourse with Sheila. Appellant did not remove her underwear. Sheila was unsure if appellant had an erection or if he penetrated her. A couple of days later, appellant would give Sheila pills, which she believed were to prevent her from becoming pregnant.

Although appellant did not threaten her or use force, Sheila was fearful that he would hit her if she refused his advances. Sheila had seen appellant hit her mother. Sheila had told her sister about appellant having made "passes" at her in 1984, but her sister did not pay attention.

Appellant was strict with Sheila and would not allow her to have boyfriends until she was 18 years old. Boys were not permitted to call her on the telephone and because all her girlfriends were dating this made Sheila unhappy.

Later, Sheila was removed from her home.

Mark Castoreno was Sheila's friend. Castoreno, who was 19 years old, met Sheila in early October 1985 at an ice cream store. They saw each other occasionally and sometimes Sheila would telephone Castoreno. However, he did not telephone Sheila because appellant would not permit it.

Several weeks after they met, Sheila called Castoreno and told him that she was distressed. He asked her why; after awhile Sheila told him that she had been sexually molested. Castoreno called several crisis centers on Sheila's behalf. Later, he called the police and spoke to a female officer, Sergeant Carlton. Eventually, at Sergeant Carlton's suggestion, Castoreno took Sheila to the police station where she was interviewed by Sergeant Carlton.

Sergeant Carlton testified that Castoreno had telephoned her twice during the week of October 28, 1985, regarding a young friend who was "having some troubles." Castoreno wanted referrals to appropriate counseling centers. Carlton gave him some telephone numbers and informed him that she was available to meet the girl if she wished. On October 31, Castoreno called back and informed Carlton that the girl had been sexually assaulted "recently" and he wanted advice on counseling her. Carlton gave him a little advice and reiterated that she was available to meet with the girl.

On November 1, Castoreno called again and said that the girl wanted to speak to her. The girl identified herself as Sheila. Carlton asked Sheila to come to see her; Sheila and Castoreno came to the office that day. Carlton interviewed Sheila. Sheila informed her of her family status, her living situation and the fact that appellant had been molesting her.

Defense Evidence

Sheila's mother testified that she was married to appellant in the Philippines in 1961. However, they were separated at the time Sheila was born. Sheila did not know appellant during the time they were living in the Philippines.

Sheila's mother, Sheila, Jeff and Joel came to the United States in 1980. John and Sheila's sister arrived in early 1981. Appellant followed some months later. Sheila's mother and appellant reconciled late in 1981, and the family moved in together in Milpitas.

Sheila's mother knew that Sheila did not like the restrictions that appellant placed on her with respect to dating boys or receiving phone calls from them. However, Sheila's mother never observed tension or difficulties between Sheila and appellant. Sheila always seemed pleased to see appellant and never expressed reluctance to be alone with him. Sheila was appellant's "favorite."

Sheila's mother "had no reason to believe" that appellant molested Sheila. Sheila's mother testified that it was the opinion of the family and those that knew appellant well that he would never molest Sheila; and the family shared the opinion that Sheila was untruthful.

Sheila's sister shared a bedroom with Sheila until Sheila was removed from the family home. During the time that Sheila lived with the family, her sister never saw appellant act in a sexually inappropriate manner with Sheila, or anyone else. According to her sister, appellant did not act in a sexually inappropriate manner with her. Sheila always seemed pleased to see appellant and never expressed any concern about being alone with him. In fact, Sheila always asked appellant to help her and went to him when she was ill. Sheila was appellant's "favorite."

According to her sister, Sheila never told her that appellant molested her. However, Sheila "once mentioned something about him holding her," but in the sister's opinion "it did not seem to be anything important or troubling."

Sheila's sister stated that it was the opinion of the family and those who knew appellant well that he would not molest Sheila; and the family shared the opinion that Sheila was not truthful.

Appellant testified that when he moved to the United States, he lived with his sister. Later in 1981, he and Sheila's mother reconciled and the family lived together in Milpitas.

With regard to Sheila and her sister dating and socializing with boys, appellant treated them both in the same way. Although Sheila did not like the restrictions,

appellant never experienced any tension in his relationship with Sheila. On the contrary, Sheila always seemed pleased to see him. Sheila was his "favorite."

Appellant testified that he never touched Sheila inappropriately. He did not molest her, fondle her, or attempt to have sex with her. "Such acts were deeply repugnant to him." Appellant did not know why Sheila would fabricate such accusations.

John was Sheila's oldest brother. He testified that he had never seen appellant act in a sexually inappropriate way toward Sheila or anyone else. Sheila never expressed concern to him about being left alone with appellant; Sheila was appellant's "favorite." John stated that it was the opinion of the family and those who knew appellant well that he would not molest Sheila; and the family shared the opinion that Sheila was not truthful.

Joel was Sheila's youngest brother. Like John, Joel testified that he had never seen appellant act in a sexually inappropriate way toward Sheila or anyone else. Joel was not aware of any concern on Sheila's part about being left alone with appellant. Furthermore, Sheila never told him that appellant touched her inappropriately. Joel did not recall being sent out of the house so that appellant could be alone with Sheila. Joel testified that Sheila was appellant's "favorite." Joel shared his family's belief that appellant would never molest Sheila and that Sheila was untruthful.

Rebuttal

Dolores Vasco and Nancy Brown both testified that they became acquainted with Sheila after she was removed from her family home. They both believed Sheila was well-behaved and forthright.

At the beginning of the trial, appellant moved to introduce certain of Sheila's statements to show that she was not a credible witness. The motion was brought pursuant to Evidence Code section 782. Defense counsel asserted that the motion "relate[d] indirectly to the prior sexual conduct of the complaining witness."

Counsel's offer of proof related to statements that Sheila made to a Doctor David Kearns on November 19, 1985. According to the offer of proof, Sheila told the doctor that she was forcefully raped on three occasions by her 19-year-old boyfriend Rommel Carlos, the last of which occurred in August 1985; and that her brother John " 'made a pass' " at her. In addition, the offer of proof stated that if called to testify, Sergeant Carlton would state that Sheila recounted only one alleged incident of rape by her boyfriend and that Sheila did not mention that her brother John made any sexual advances toward her. Lastly, if called to testify, John would state that he never made any "passes" toward Sheila.

The prosecution moved to exclude the alleged statements pursuant to Evidence Code section 1103, subdivision (b)(1). The prosecution argued that appellant was prohibited from introducing evidence of the sexual conduct of the victim other than that which allegedly occurred with appellant. The prosecution argued that Evidence Code section 787 prohibited impeachment of the victim with other sexual conduct. Thus, evidence of Sheila's alleged reports of prior sexual conduct were inadmissible to attack her credibility.

On June 25, 1986, the court denied the motion. The next day the jury was sworn in. During its case in chief, the prosecution elicited testimony from Mark Castoreno to the effect that Sheila had informed him in confidence that she had been sexually assaulted.

On June 27, 1986, outside the presence of the jury, the court conducted a hearing on appellant's motion for reconsideration regarding the alleged impeachment evidence. Defense counsel argued that he should be allowed to introduce evidence of Sheila's initial complaint to Mark Castoreno concerning sexual abuse by her boyfriend, not appellant. Otherwise, the testimony adduced during the prosecution's case in chief—that Sheila made an unsolicited complaint of sexual molestation—would be misleading because the jury would assume the initial complaint concerned appellant.

At the hearing, the defense called Sergeant Carlton to testify in support of the motion. Carlton stated that at her first meeting with Sheila, Sheila told her that she had been sexually assaulted by her boyfriend. However, at the next meeting, Sheila told her that she was molested by appellant as well. Her police report listed Sheila's boyfriend and appellant as suspects in the sexual assault on Sheila. Defense counsel assured the court that he had spoken to Sheila's boyfriend and he denied any non-consensual sex with Sheila, but was not available to testify based on the possibility of his own self-incrimination. The trial court denied the motion for reconsideration and reiterated its original ruling.

The trial continued for the rest of the day and on into June 30, 1986. The jury retired to deliberate at 4:37 p.m. on June 30th. The next day, the jury requested read back of Sheila's testimony and another reading of the jury instruction on rape. At 2:27 p.m. the jury returned verdicts of guilty on all counts.

Discussion

At the outset, we make the following observation: " 'It is well settled that [a reviewing] court has the inherent power to dismiss an appeal by any party who has refused to comply with the orders of the trial court.' [Citation.] The theory . . . is that '[a] party to an action cannot, with right or reason, ask the aid or assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]' " (*People v. Kubby* (2002) 97 Cal.App.4th 619, 622 (*Kubby*).) Here appellant fled the jurisdiction before sentencing when he knew that he was due to return to court on August 12, 1986.

However, because dismissal is discretionary (*People v. Buffalo* (1975) 49 Cal.App.3d 838, 839) and since appellant is now in custody we will address appellant's claims on the merits.

Exclusion of Purported Impeachment Evidence

Appellant contends that the trial court erred when it precluded defense counsel from impeaching Sheila with the prior false accusations of rape by her boyfriend and sexual molest by her brother John. Furthermore, the trial court impermissibly precluded him from clarifying that Sheila's initial complaint to Castoreno concerned sexual misconduct by her boyfriend, not appellant.

Appellant argues that Evidence Code section 1103, subdivision (c)(1) does not preclude the use of the impeachment evidence in this case because Evidence Code section 1103 pertains only to evidence used to prove consent by the complaining witness. Furthermore, Evidence Code section 1103, subdivision (a)(1) allows a defendant to introduce specific acts evidence to prove conduct of the victim. Moreover, Evidence Code section 782 is only a procedural section that sets forth certain notice and hearing requirements for considering such evidence. As such, in essence, appellant asserts that the proffered evidence was admissible to impeach Sheila's credibility, i.e., to show that she made false statements.

We note that for our purposes, in 1986 Evidence Code section 1103 looked substantially similar to the way it looks today except for a renumbering of subdivisions. In 1986 Evidence Code section 1103 stated, "(b)(1) Notwithstanding any other provision of this code to the contrary and except as provided in this subdivision, in any prosecution under Section 261 [rape] or 264.1 [rape in concert] of the Penal Code, or under Section 286 [sodomy], 288A [oral copulation] or 289 [penetration with a foreign object] of the Penal Code, or for assault with intent to commit, or conspiracy to commit a crime defined in any such section . . . opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the complaining witness."

(Stats. 1981, ch. 726, § 2, pp. 2876-2877.)[4] Evidence Code section 787 provided then, as it does now, "evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness." (Stats 1965, ch. 299, § 2.) These were the Evidence Code sections, along with the case of *People v. Jones* (1984) 155 Cal.App.3d 153 (*Jones*), upon which the prosecution relied to argue that the purported impeachment evidence should be excluded.

In *Jones*, a rape case involving numerous child victims, the Fifth District Court of appeal explained, "Unless precluded by statute, any evidence is admissible to attack the credibility of a witness if it will establish a fact that has a tendency in reason to disprove the truthfulness of the witness' testimony, and any evidence is admissible to support the credibility of a witness if it will establish a fact and has a tendency in reason to prove the truthfulness of the witness' testimony. (Evid. Code, § 780.) Certain evidence that would otherwise be relevant to effect credibility is made inadmissible by statutory provisions. Thus, evidence of character traits to affect the credibility of a witness is limited to the traits of honesty, veracity, or their opposites by section 786 of the Evidence Code. Section 787 of the Evidence Code makes inadmissible evidence of specific instances of bad or good conduct, with the exception of a felony conviction, to prove a witness' character trait to attack or support the credibility of the witness." (*Jones*, *supra*, 155 Cal.App.3d at pp. 162-163, 182.)

In *Jones*, the defense sought to introduce evidence that one of the victims had a character trait of vindictiveness, and that both she and two other victims made false charges against people. The trial court ruled that the only character trait of the victims that the defense counsel could explore was that for honesty or veracity. On appeal, the defendant complained that he was precluded from questioning the mother of one of the victims regarding her daughter's history of fabricating charges and her daughter's

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[4] Subdivision (b)(1) is now subdivision (c)(1).

vindictive nature, and presenting evidence from the victim's school teachers of specific instances where the victim reacted to discipline by hostile actions. (*Jones, supra*, 155 Cal.App.3d at p. 182.)

The appellate court pointed out that evidence that the victim would falsely accuse someone other than defendant of rape, established "her character trait of threatening to make false allegations of rape," but such evidence was made inadmissible to attack her credibility by Evidence Code section 787. In other words, although Evidence Code section 786 limited evidence of character traits to attack the credibility of a witness to the character traits of dishonesty or untruthfulness and while the victim's threat of false accusations of rape would relate to the character traits of untruthfulness, section 787 of the Evidence Code provided that specific instances of conduct relevant only to prove a character trait were inadmissible to attack a witness's credibility. (*Jones, supra*, 155 Cal.App.3d at p. 183.)

At the time of appellant's trial, the lower court did not have the benefit of the First District Court of Appeal's decision in *People v. Adams* (1988) 198 Cal.App.3d 10 (*Adams*). In *Adams*, the Court of Appeal held that the "Truth-in-Evidence" provision of Proposition 8 passed by the electorate in June 1982 (Cal. Const., art. I, § 28, subd. (d)), invalidated Evidence Code section 787. That is, evidence of the victim's prior specific acts of falsely accusing others of rape was relevant and admissible on the issue of her credibility, manifested through a claimed character trait of dishonesty and falsely accusing others of rape. (*Adams, supra*, 198 Cal.App.3d. at p. 18.)

Consequently, in *People v. Franklin* (1994) 25 Cal.App.4th 328 (*Franklin*), this court concluded that a trial court erred in excluding evidence that the minor victim of continuous sexual abuse had falsely accused her own mother of licking her genitals. (*Id.* at pp. 335-336.) We stated: "Just as a prior false accusation of rape is relevant on the issue of a rape victim's credibility [citation], a prior false accusation of sexual molestation is equally relevant on the issue of the molest victim's credibility." (*Id.* at p. 335, fn.

omitted.) "[I]f the trier of fact found it true that [the victim] falsely stated that her mother sexually molested her, this statement would be relevant to the trier of fact's determination of her credibility on defendant's culpability." (*Id.* at p. 336.) We pointed out, "Even though the content of the statement has to do with sexual conduct, the sexual conduct is not the fact from which the jury is asked to draw an inference about the witness's credibility. The jury is asked to draw an inference about the witness's credibility from the fact that she stated as true something that was false. The fact that a witness stated something that is not true as true is relevant on the witness's credibility whether she fabricated the incident or fantasized it." (*Id*. at p. 335.)

Franklin makes the point that sometimes what is most relevant about a victim's statement about his or her own sexual conduct is not whether the victim engaged in the activity, but whether the statement is truthful.

However, in *Franklin, supra,* 25 Cal.App.4th 328 we found the trial court's error in excluding the victim's statements to be harmless because the evidence was cumulative of other evidence bearing on the victim's credibility. (*Id.* at p. 337, but see *Franklin v. Henry* (9th Cir.1997) 122 F.3d 1270 [granting habeas relief].)

The Attorney General argues that the evidence of the alleged false accusations was subject to evaluation under Evidence Code section 352. However, on the record before us it does not appear that the trial court engaged in an Evidence Code section 352 analysis. It would be inappropriate for this court to so engage now on a record that is as devoid of detail on the subject as is this one. For evidence to be properly excluded under Evidence Code section 352, "the record must 'affirmatively show that the trial court weighed prejudice against probative value.' [Citations.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1237.) An Evidence Code section 352 argument requires the parties to explain why their evidence is, or is not, time consuming, confusing and/or more probative

than prejudicial. Since that did not happen in this case, the parties had no chance to make those fact-based arguments.[5]

Nevertheless, "Evidence Code section 354 provides inter alia that an erroneous exclusion of evidence shall not cause a judgment to be reversed unless the error complained of resulted in a miscarriage of justice and it appears of record that: '(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the question asked, an offer of proof, or by any other means; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination.' " (*Adams, supra,* 198 Cal.App.3d at p. 18.) To put it simply, the erroneous exclusion of evidence warrants reversal only if it led to a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 354; *People v. Breverman* (1998) 19 Cal.4th 142, 173.)

Basically, this trial was a credibility contest between Sheila and appellant. We gather that there was no physical evidence; that according to family members Sheila's emotional state during the alleged molest was normal; and that Sheila did not disclose appellant's molest to Sergeant Carlton until at least her second meeting with the officer.

Nevertheless, the exclusion of the evidence of Sheila's purported false accusations did not result in a miscarriage of justice. The function of the excluded testimony was to impeach Sheila's credibility. Ample evidence for this purpose was placed before the jury: the jury heard from every member of Sheila's family who testified that Sheila was untruthful.

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[5] It is possible that the trial court excluded the evidence based on the substance of appellant's offer of proof. Appellant acknowledges that Rommel Carlos was not going to testify at trial; and Sheila's brother John was not called as a witness at the Evidence Code section 402 hearing. However, the prosecution did not argue that the questioning of Sheila about her allegations of rape and molest should be excluded because Rommel Carlos and her brother might not be able to testify.

In addition, the jury had the opportunity to observe the witnesses, including Sheila and appellant, testify. With the knowledge that many people thought that Sheila was untruthful, deliberations, recesses and the reread of Sheila's testimony took less than six hours; an indication that this was not at all a close case since the jury deliberated for less than four hours and had to decide the truth on five counts.

On this record, we cannot say that the exclusion of the purported impeachment evidence resulted in a miscarriage of justice.[6]

Appellant contends we should review the effect of the trial court's ruling under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 (87 S.Ct. 824), which is reserved for errors of a constitutional dimension. Unless a trial court's ruling "completely exclude[es] evidence of an accused's defense," the proper standard of review for an evidentiary ruling is the one announced in *People v. Watson* (1956) 46 Cal.2d 818 836. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Here, the trial court's evidentiary rulings regarding the impeachment testimony had absolutely no impact on appellant's ability to testify that Sheila was untruthful; nor on his ability to elicit testimony from Sheila's family members that they were of the belief that Sheila was a liar.

As to appellant's argument that exclusion of the impeachment evidence was a violation of his Sixth and Fourteenth Amendment rights to present a defense, we note that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, [citation], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, [citations], the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " (*Crane v. Kentucky* (1986) 476 U.S. 683,

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[6] Furthermore, a trial court has discretion to exclude impeachment evidence if it is collateral, cumulative, confusing, or misleading. (*People v. Price* (1991) 1 Cal.4th 324, 412.) On the record before us, we can safely say that the excluded evidence, although admissible and potentially probative, was cumulative. Therefore, although the court erred in excluding the evidence, the error was harmless.

690 [106 S.Ct. 2142].) However, "[a] defendant's right to present relevant evidence is not unlimited . . . . [Citations.] A defendant's interest in presenting such evidence may thus ' "bow to accommodate other legitimate interests in the criminal trial process." ' [Citations.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 308 [118 S.Ct. 1261], fn. omitted.) One such interest is adherence to standard rules of evidence. (*Taylor v. Illinois* (1988) 484 U.S. 400, 410 [108 S.Ct. 646]; *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1756.) "Although completely excluding evidence of an accused's defense theoretically could rise" to the level of impairing an accused's right to present a defense (*People v. Fudge, supra*, 7 Cal.4th at p. 1103), such was not the case here. As noted, all Sheila's family members who testified stated that Sheila was untruthful. Thus, appellant was not precluded from raising a defense.

For all of these reasons, we reject appellant's assertion that the trial court erred when it precluded him from presenting impeachment evidence that Sheila had made a prior allegation of rape against her boyfriend and sexual molest allegations against her brother John.

Motion for a New Trial

Before sentencing in 1986, defense counsel filed a motion for a new trial. Counsel argued that the prosecution had made the lack of impeachment of Sheila's credibility a "dominant theme" in its closing argument. The prosecution argued that there was no evidence of the falsity of Sheila's allegations against her boyfriend. Before the date on which the motion was to be heard, appellant fled the jurisdiction. Accordingly, the trial court never ruled on the new trial motion.

After appellant was arrested over 21 years later, on May 15, 2008, his new defense counsel filed a "Supplemental memorandum of points and authorities in support of defendant's motion for a new trial." On May 22, 2008, counsel filed a second supplemental memorandum in which counsel explained that new evidence had been

discovered. Counsel asserted that Sheila's former boyfriend Rommel Carlos was prepared to testify to matters that would serve to impeach Sheila's testimony.

On May 28, 2008, the date set for hearing and sentencing, the trial court stated that it had read the relevant documents, including those from 1986. After counsel argued the motion, the trial court took the matter under submission.

On June 18, 2008, counsel filed a third supplemental memorandum in which she asserted more new evidence had been discovered. According to defense counsel, this new evidence was a statement made by Sheila to an investigator on the morning of May 28, 2008, in which she said she did not recall telling the police in 1986 that Rommel Carlos had raped her.

On June 20, 2008, after acknowledging receipt of the third supplemental memorandum and argument of counsel, the trial court denied the motion for a new trial. The court reasoned that under Evidence Code "section 352 having two trials within a trial would clearly be an undue consumption of time."[7]

We review the trial court's denial of the new trial motion based on newly discovered evidence for an abuse of discretion. (*People v. Earp* (1999) 20 Cal.4th 826, 890.) "A motion for a new trial on newly discovered evidence is looked upon with disfavor, and unless a clear abuse of discretion is shown, a denial of the motion will not be interfered with on appeal." (*People v. McDaniel* (1976) 16 Cal.3d 156, 179.)

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[7] In denying the motion, the court found that with regard to the original trial the record was devoid of any offer of proof presented as to Rommel Carlos or Sheila's brother. Moreover, he found that even if the original judge had had the information he would have conducted an Evidence Code section 352 analysis and could have determined that the information would not come in because it would have forced the parties to present evidence concerning two past sexual incidents that never reached the stage of formal charges. With regard to the destruction of the trial transcripts, the judge observed that appellant's absence was the precipitating event that caused the conundrum. However, the court and the parties had done their best to "reconstruct" the record.

A new trial may be granted "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable." (§ 1181, subd. (8).)

In ruling on a new trial motion based on newly discovered evidence, the trial court must consider the following factors: " ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*).)

Even if we assume that the defense could not with reasonable diligence have discovered and produced Rommel Carlos's testimony at the first trial, "the trial court may consider the credibility as well as materiality of the [newly discovered] evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable." (*People v. Beyea* (1974) 38 Cal.App.3d 176, 202.)

Here, freed from the threat of an investigation into Sheila's allegation by the expiration of the statute of limitations, Rommel Carlos could say whatever he wished and lie with impunity. Thus, his credibility after all these years is suspect.

Moreover, since there was extensive testimony in the first trial that Sheila was untruthful, rather than seriously undermine the prosecution, the new evidence proffered by appellant would have done nothing more than corroborate that evidence and reiterate theories that the jury would have already heard.

In our view, we believe that the trial court's implied conclusion that the proffered evidence was not " ' "such as to render a different result probable on a retrial" ' " of the matter (*Delgado, supra*, 5 Cal.4th at p. 328), and therefore appellant was not entitled to a new trial, was not an abuse of discretion.

As to appellant's argument that his federal constitutional rights were violated by the denial of his new trial motion, we observe that although "the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326 [126 S.Ct. 1727]), "the Constitution permits judges 'to exclude evidence that is "repetitive . . . , only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." ' [Citations.]" (*Id*. at pp. 326-327.) Here, as noted several times, appellant's proffered evidence to prove that Sheila was untruthful was repetitive of other evidence presented in appellant's trial and would have confused the issues for the jury.

Disposition

The judgment is affirmed.

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ELIA, Acting P. J.

WE CONCUR:

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MIHARA, J.

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McADAMS, J.